Supreme Court, U.S.
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In the

**SUPREME COURT OF THE UNITED STATES**

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99 - 7859

STELLA CHERTKOVA,
*Petitioner,*
v.
CONNECTICUT GENERAL LIFE
INSURANCE, CO.,
*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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**Petition for Writ of Certiorari**

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Stella Chertkova
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*pro se*

68 pp

## STATEMENT OF QUESTIONS PRESENTED

1. It is well settled in law that District Courts have unlimited discretion in running all pretrial and trial matters. If this unlimited discretion was not subject to appeal it would amount to arbitrariness as a matter of law and arguably contradict the fourteenth amendment of U.S. Constitution. It is, therefore, the singular responsibility of the Appellate Court to enforce the "*due*" (as opposed to "*arbitrary*") legal process and equal protection of law provided by the Constitution. However, Rule 36 of Federal Rules of Appellate Procedure calls for judgment on appeal to be entered "as court instructs". According to this rule, some judgments are entered as published opinions with precedential authority, some as unpublished opinions, explicitly excluded from precedential authority, and still others - without an opinion altogether. This assortment of dispositions allows Appellate Court complete freedom to practice its own arbitrariness in the only guaranteed step of the legal process designed specifically to prevent it. Is rule 36 consistent with the fourteenth amendment of U.S. Constitution?

2. Whether Rule 36 of Federal Rules of Appellate Procedure fall under the category of 28 U.S.C., § 2072 (b) and therefore should not be in force?

3. In *Faye Anastasoff v. USA* Eighth Circuit's opinion concluded that exclusion of unpublished opinions from precedent is unconstitutional. Does the concept of "unpublished" opinion violate the U.S. Constitution and invalidate the case law doctrine?

## PARTIES

The party to this petition is Stella Chertkova.
The parties in the courts below were Stella Chertkova and Connecticut General Life Insurance,
CO. (CIGNA).

## TABLE OF CONTENTS

*Page*

PRIOR OPINIONS ..... 1

JURISDICTION ..... 1

STATUTES INVOLVED ..... 1

STATEMENT OF THE CASE ..... 2

I. PROCEDURAL HISTORY ..... 2

II. FACTS ..... 4

III. THE REASONS WHY WRIT OF CERTIORARI SHOULD BE GRANTED ..... 11

1. Rule 36 permitted Appellate Court distorted evidence. ..... 13
2. Rule 36 permitted Appellate Court to ignore issues presented on appeal. ..... 15
3. Rule 36 permitted Appellate Court to redefine the historically and linguistically established meaning of words and concepts. ..... 16
4. Rule 36 and the practice of "unpublished" opinion permitted Appellate Court to disregard well settled law. ..... 16
5. "Unpublished" opinions invalidate the essence of common law and the substance of the case law doctrine. ..... 17

CONCLUSION ..... 22

## TABLE OF APPENDICES


| | *Page* |
|---|---|
| Opinion,<br>United States Court of Appeals for the Second Circuit,<br>decided August 9, 1996 | A |
| Summary Order,<br>United States Court of Appeals for the Second Circuit,<br>entered April 4, 2000 | B |
| Order of July 27, 2000, United States Court of Appeals for the Second Circuit,<br>Denying Petition For Rehearing. | C |
| Judgment of July 1, 1999, United States District Court | D |

## TABLE OF AUTHORITIES

Chertkova v. Connecticut Gen. Life Ins. Co., at F.3d 81, 92 (2d Cir. 1996).

U. S. v. Dwyer, 539 F.2d 543, 550 (2d Cir. 1976).

U.S. v. Jamil, 707 F 2d. 638, 642 (2d Cir. 1983).

LaFond v. General Physics Services Corp., 50 F.3d. 165,171 (2d Cir. 1995).

Gallo v. Prudential Residential Servs, 22 F. 3d 1223 (2d Cir., 1994).

Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F. 2d. 54 (2d Cir., 1987).

Cronin v. Aetna Life Ins. Co., 46 F. 3d 196, 202-03 (2d Cir. 1995).

Ramseur v Chase Manhattan Bank, 865 F. 2d at 460, 465 (2d Cir. 1989).

Chambers v. TRM Copy Ctrs. Corp., 43 F. 3d 29, 37 (2d Cir., 1994).

Virgin Atl. Airways v. National Mediation Bd., 956 F. 2d 1245 (2d Cir. 1992).

Hurley v Atlantic City Police Dep't, 174, F.3d 95(3d Cir., 1999).

Howley v.Town of Stratfort and William Holdsworth.

## PRIOR OPINIONS

The opinion sought to be reviewed is unpublished. (App. B). The opinion by the United States Circuit Court of Appeals for the Second Circuit, Chertkova v. Connecticut Gen. Life Ins. Co., was published at F.3d 81, 92 (2d Cir. 1996) (App. A). The opinions of the District Court of Connecticut on two summary judgments are unpublished.

## JURISDICTION

Petitioner seeks this Court's review of the judgment entered on April 4, 2000 by the United States Circuit Court of Appeals for the Second Circuit, by a Petition for Writ of Certiorari pursuant to the jurisdiction conferred by 28 U.S.C. Section 1254(1). This Petition is timely filed because it was mailed within ninety days of July 27, 2000, the date a motion for rehearing en banc was denied in the court below. Rules 13.1, 13.3 and 29.2.

Jurisdictional basis for the Second Circuit is 28 U.S.C. 1291, and for the District Court is 28 U.S.C. 1331 and 1337.

## STATUTES INVOLVED

*The Fourteenth Amendment to the United States Constitution* provides, in relevant part:

No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

*28 U.S.C. § 2071, § 2072 (1976 )* provide:

Sec. 2071.

(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts

of Congress and rules of practice and procedure prescribed under section 2072 of this title.

Sec. 2072.

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

## STATEMENT OF THE CASE

### I. PROCEDURAL HISTORY

In the fall of 1993 plaintiff filed a federal claim 3:93CV2046 (AVC) that alleges a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e with two counts of negligent misrepresentation attached to it. The first claim of negligent misrepresentation stated that in 1990 - 1992 defendant started the campaign of Total Quality Management (TQM) and CIGNA VALUES, that encouraged employees' involvement and empowerment and at the same time prosecuted and eventually terminated the plaintiff for challenging her management and making constructive suggestions. In 1994 the defendant, Connecticut General Life Insurance, CO. (CIGNA), filed a motion for summary judgment, claiming it had overwhelming evidence that plaintiff was lawfully disciplined for poor communication and "active listening"skills. Despite the claim of such evidence, none was presented with the motion for summary judgment. In fact, the only evidence CIGNA presented consisted of the oblique documents memorializing the disciplining of the plaintiff with nothing but generalities. Not a single incident of plaintiff's behavior that

demonstrated the alleged poor communication or problem with "active listening"skills was documented. Not a single name of a user who allegedly " refused" plaintiff's services or of a co-worker who allegedly declined to seek plaintiff's advice despite her "superior technical knowledge", was present in either the disciplining documents or in the motion for summary judgment. The only specific information provided in the motion for summary judgment relied on the misconstrued plaintiff's testimony about two meetings with management where she asked legitimate questions in a highly professional manner. One meeting took place in the summer of 1990, almost two years before the plaintiff was terminated, the second in March of 1991 - one year before plaintiff's last day with CIGNA . In reply to the defendant's motion for summary judgment the plaintiff provided detailed information about her work history at CIGNA and corroborating evidence from every user she had in the last few years at CIGNA. Altogether, fourteen people attested to plaintiff's superior technical and communication skills and her high work ethics. In addition, a number of testimonies including plaintiff's, pointed to poor communications skills on the part of Craig May (May) and Jeff O'Neil (O'Neil), who harassed the plaintiff. In the reply motion the defendant simply asserted that the evidence existed only in the plaintiff's imagination.

In the summer of 1995, District Court granted defendant's motion for summary judgment in an unpublished opinion and dismissed all counts of the claim. Contrary to well established standard for summary judgment and its strict instruction to consider all the evidence presented in such a motion *in the light most-favorable to the non-moving party,* the District Court bluntly ignored a few hundred pages of the evidence presented in the plaintiff's replies and repeated the defendant's proffered "undisputed facts" word for word. The summary judgment was appealed and resulted in an opinion of the Second Circuit that the plaintiff's claims were meritorious and could proceed to trial. See Chertkova v. Connecticut Gen.

Life Ins. Co., 92 F.3d 81, 92 (2d Cir. 1996), App A). Thereafter, CIGNA renewed its motion for summary judgement on two counts of negligent misrepresentation, using the same wording and the same vigorously disputed "facts". In an unpublished memorandum of decision dated September 12, 1997, the District Court granted summary judgment in defendant's favor. Although every "fact" in the defendant's motion contradicted CIGNA's own documents, the District Court once again endorsed the defendant's version of fact and ignored all the evidence and arguments presented by the plaintiff. The District Court agreed with the defendant that CIGNA's senior management's memoranda were not false, and that the treatment plaintiff received at CIGNA was consistent with the company's proffered statements about "open and honest communication".

The trial of the only remaining count - gender discrimination - took place in June of 1999, and a verdict for the defendant was rendered by the jury. The trial was marked by an unrealistic time limit of five days, by the District Court's comments and rulings prejudicial to the plaintiff and by the perjuries of the defendant's witnesses. Since the two counts of misrepresentation were not submitted to the jury the defendant was free to argue that the plaintiff's professional disagreements with her management, not gender discrimination, were the real reason for the plaintiff's termination. The defendant did not call Mr. May to testify and didn't hide the fact that it later fired him.

The jury verdict, as well as the District Court's ruling on the summary judgement for two counts of negligent misrepresentation, had been appealed and dismissed by the 2d Circuit Appellate Court with a summary order. (App. B). In the *unpublished* opinion a panel of three judges (a panel different than the panel that filed the *published* Chertkova v. Connecticut Gen. Life Ins. Co.) agreed with the District Court that the disciplining of the plaintiff *was proper* and that the defendant's TQM campaign representations were not false. The plaintiff filed a petition for rehearing en banc

which was denied on July 27, 2000. (App C)

## II. FACTS

The plaintiff - an experienced computer professional with an MS in mathematics from the University of Leningrad, Russia - was an employee of the defendant from June, 1979 to March 5, 1992. Up to 1990 the plaintiff received a number of promotions and awards and ultimately held a title of Assistant Director of Information Services. In the spring of 1990 a new manager, Assistant Vice President Craig May (May), had become the head of Operations Engineering (OE) - a department within Information and Technical Services Division ( ITSD). The plaintiff was highly regarded by her users and colleagues and enjoyed cordial and a mutually respectful relationship with four previous managers. She was awarded recognition for superior performance just a few months prior to May's appointment and worked on an important development project which would in the end have dramatically benefitted the company's operation. At the time of May's appointment CIGNA's senior management acknowledged in open forums that the company faced serious business problems at the time of escalating health care costs, formidable competition and strong national sentiment towards restructuring and possibly nationalizing the Health Care System. CIGNA SYSTEMS' senior management was particularly concerned with the run out costs of systems development. For instance, after spending 20 million dollars on new Medical Claims Systems, CIGNA had canceled the project because of the technical difficulties, poor planning and escalating costs.

Senior VP of CIGNA SYSTEMS Mike Natan organized an all-out campaign encouraging employees to change the culture and "Operating Values" of ITSD and treat CIGNA's business and CIGNA's money as their own. He stressed employees' empowerment and Total Quality Management (TQM) as the main means of transfer to the new culture. To emphasize

the importance of the change Mr. Natan appointed an "Operating Values Tsar" reporting directly to him. Human Resources (HR) were actively involved in all aspects of introducing a new value system and changing the environment. Representatives of HR conducted Employee Survey and Focus Groups, attended training sessions and were supposed to be the sounding board for employees during the transition to the new culture. The managers were renamed into "team leaders" and were compelled to take an "Active Listening Skills" course in order to communicate in the new way with their "self-governing" teams. In a flood of newsletters, memoranda and meetings senior management appealed to employees to show initiative, challenge status quo, discourage politics and join forces in a quest for change.

Contrary to CIGNA's professed goals, May canceled the important project the plaintiff worked on and assigned her to a new project which suited his personal political interests. Despite the fact that it was obvious within two weeks that this project was not technically feasible and would not have satisfied users needs even if it was, May insisted on going forward with it. After six months of wasted efforts, users expressly refused to continue the project and May had no choice but to cancel it. The plaintiff tried to persuade May to change the approach in the direction that users needed, but he refused to talk to her. He claimed to users (Security Administration area), that his organization -- OE -- could not develop the system they needed *because OE had no resources,* while the plaintiff had practically *nothing to do* and was eager to develop an automated system for Security Administration.

Heeding senior management's (particularly Mike Natan's) appeals for action, the plaintiff built the automated Security Administration system on her own time and initiative and submitted it as an Employee Suggestion. By doing it she not only wanted to help her users, but also wanted to show Mr. Natan that building effective and user friendly systems didn't have to cost millions. In addition, she wanted to demonstrate that a laborious and highly process oriented methodology of

system development at CIGNA was largely to blame for the high costs and poor quality of the applications.

Prior to submitting the new Security Administration system as an Employee Suggestion, the plaintiff discussed it with the Vice President Boyd Hopkins, who reported directly to Mr. Natan and was responsible for Security Administration among other things. She explained to Mr. Hopkins that May was strongly opposed to the idea and that by going forward with it she was taking a risk of losing her job. She made it clear to Mr. Hopkins that she was willing to take the risk if he could guarantee a fair hearing. Mr. Hopkins showed genuine interest in the system and encouraged the plaintiff to go ahead with the Employee Suggestion.

Despite the fact that the Security Administration system was submitted through the company approved channel of Employee Suggestions and received positive evaluation from the panel of users, including Mr. Hopkins, May instigated harassment of the plaintiff that continued for over a year and culminated in plaintiff's nervous breakdown. The plaintiff was disciplined and put on probation on May's orders for non-existing problems with the "lack of active listening skills" and "communication". In addition, probation documents declared that dissenting opinions were allowed only in an "appropriate, *private* setting", in reference to plaintiff's asking some serious questions during a departmental "Communication" meeting with management. This meeting was a part of TQM campaign and was set up specifically to give employees an opportunity to discuss any important issue in an "*open and honest*" manner, "*without a fear of retribution*". So, while senior management assured employees that an "*open and honest*" communication was appropriate, plaintiff's direct management put her on probation because in May's and O'Neil's opinion an "open" communication could take place *only* in a *private* setting. Although probation documents claimed that plaintiff didn't listen to her users and that users refused to work with her, no names or specifics were ever provided. Contrary to the criticisms expressed in official documents, a

letter from plaintiff's direct supervisor Jeff O'Neil to June Cocolla of Human Resources marked "Personal and Confidential", admitted that *plaintiff's relationship with her users was good.* Behind the closed doors, Jeff O'Neil berated and threatened her and demanded that she withdraw the Employee Suggestion. Boyd Hopkins who promised a "fair hearing" did nothing to help.

In the summer of 1991 the plaintiff was assigned a highly visible project and responsibility for a computer system critical for the consolidation of three data centers into two scheduled for February 1992. Because no one else in the department possessed technical knowledge for this project, her management did not fire her at the end of the probation period in September of 1991, but concluded that she passed the probation. However, she was warned that she could be terminated any time within two years without additional discipline if the same unspecified problems re-occurred. The new project, called ORCA, required carrying a beeper 24 hours a day, seven days a week, frequent night and week-end work without any compensation time and the juggling of multiple projects simultaneously. Despite the relentless scrutiny and formidable workload, plaintiff not only effectively implemented required changes in ORCA, but made a suggestion to rewrite an obsolete closely related product. This suggestion was enthusiastically received by the users. She kept a low profile, didn't speak at any open forums and refrained from any action that could be perceived as even mildly critical of her management. In other words, from the time of her probation in the summer of 1991 the plaintiff remained silent as her management required. Nevertheless, as soon as the data center consolidation was completed in February of 1992, the harassment of the plaintiff sharply escalated. It was apparent that OE management was moving to terminate her and sought any pretext to document her alleged poor communication skills. The real physical demands of the job combined with the relentless criticisms, scrutiny and fear of missing a beeper call or making a critical mistake, caused the plaintiff anxiety and loss of sleep.

On March 5, 1992, after working a few days and nights without sleep, the plaintiff suffered a nervous breakdown directly related to her working conditions - a fact confirmed by her doctor and by an independent medical examiner (IME), appointed by CIGNA. Both doctors concluded that the plaintiff could not work in May's organization and suggested transfer to another department after treatment. CIGNA ignored the recommendation. The plaintiff applied for short term disability, but CIGNA disregarded her application for six months and the plaintiff had no choice but to file a claim for workers comp on the advice of her attorney. The plaintiff made numerous efforts to return to work at CIGNA after March 5, 1992, through her attorney and on her own. Believing that she was still an employee of the defendant, the plaintiff worked long hours at home and developed a comprehensive system for all CIGNA's administrative needs. The system had far reaching applicability and could have saved CIGNA many millions of dollars. She presented this system as a second employee suggestion and asked for the permission to show the system to Mr. Natan and CIGNA users. CIGNA responded with scornful rejection. In September of 1992 CIGNA retroactively paid plaintiff's short term disability for six months, half of which went to pay the legal costs. The plaintiff didn't have any income after September 6, 1992 and was in psychological, financial and emotional turmoil - an immigrant and a single mother with high mortgage and son in an expensive private college - she did not have any savings or other means of support. In September of 1992 the plaintiff traveled to Philadelphia to seek the help of Executive Vice President Don Levinson in charge of Human Resources, whom she knew from his years in Connecticut. Although Mr. Levinson was initially friendly and warm, his conduct instantly changed as soon as he realized that this visit was not a social occasion. He claimed to be busy and despite plaintiff's willingness to stay in Philadelphia for as long as necessary, Mr. Levinson didn't think he could find fifteen minutes to talk to her. His secretary suggested

that the plaintiff write a letter to Mr. Levinson, which she did. In his reply Mr. Levinson expressed his concern that the plaintiff "was not allowed to be heard" and his assurance that Ms. Cocolla - a Human Resource Assistant Director - would willingly help. But the only help Ms Cocolla offered was her advice to write a letter to Mr. Natan and to submit a complaint to Speak Easy - the organization within Human Resources whose responsibility was to arbitrate employees' disputes with management. This advice, after a few months, proved to be a ploy and a bureaucratic stone wall. Mr. Natan responded with a brief refusal to meet with the plaintiff and see the system, and shortly afterwards her second employee suggestion was rejected. Betty Crosson, the manager of Employee Suggestions department, notified the plaintiff in November, 1992, that a committee of ten senior managers chaired by Senior Vice President Mike Natan evaluated the proposed CIGNA Administrative System[1] and unanimously concluded not to pursue its implementation.

In January of 1993 the plaintiff conducted depositions of her immediate management and Ms. Cocolla in the Workers comp case and learned that CIGNA in fact was ready to terminate her on March 6, 1992, but allegedly did not hand her the termination letter because the plaintiff went on disability[2]. So defendant's professed consideration of plaintiff's second Employee Suggestion by a committee of ten managers chaired by Senior Vice President Mike Natan in November of 1992, could not have taken place and was a fabrication. At that time the plaintiff had been in essence terminated and was not regarded as the defendant's employee for more than

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1. Without ever seeing it.

2. In reality CIGNA sabotaged plaintiff's application for disability for six months and had plenty of time to notify plaintiff of termination prior to finally accepting her disability claim. However, CIGNA withheld this information from the plaintiff so that in case of a litigation it could claim that plaintiff was not terminated and therefore had no legal standing for a discrimination action.

eight months.

Harassment of the plaintiff occurred in the atmosphere of a strong Old Boy network, where women were never a part of the decision making process, regardless of their titles. Another senior female employee under Mr. May, Patricia Endweiss, a Director and CIGNA employee for 22 years, who held an MS in Computer Science and was regarded as one of the most competent managers in the division, was also disciplined for non-existing problems with "team work" and "active listening skills". She was terminated by May in January of 1992. Other women were leaving CIGNA SYSTEMS in large numbers.

## III. THE REASONS WHY WRIT OF CERTIORARI SHOULD BE GRANTED

The issue of equal justice is central to American Judicial System. It is explicitly stated in the Fourteenth Amendment to the United States Constitution[3] and is the main reason for the existence of the Judicial System. Indeed, if the goal of the Judicial System was simply to provide means for a conflict resolution, it could be accomplished in uncomparably less expensive and much more expedient way through arbitration. The monstrous costs and stupendous complexity of the legal process in the United States can not be justified if law does not strive for predictability, uniformness, accountability and fairness. If the final product of procedurally correct legal process is *not justice,* than all the rhetoric of procedures and learned opinions would be nothing more than an intellectual exercise at its best or a game of trickery at its worst. Thus,the

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3. The annotation to the Fourteenth Amendment in the United States Constitution gives the following definition of *due process:* "Due process of law is a process which, following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought."

most important question this Court can address is: "*Does our legal process have reliable safeguards to insure that the final product of judicial labor is, indeed, justice?*" The following analysis might assist the Honorable Court.

The District Courts have broad discretion over all pre-trial and trial matters. This is a wise and the best practical solution for dealing with the volume of caseload and the immensity of the issues involved in every case. Indeed, if the legal authority of a District Court could be challenged on every decision made during lengthy and elaborate processes of litigation, no litigation would ever come to conclusion. However, the standard of unlimited discretion brings the possibility of its abuse and arbitrariness, and therefore requires an extra step in the process (the appeal) to detect and reverse such abuses. But are there any safeguards in the legal process to protect *the appeal* from the abuse of discretion *by the Appellate Court*? Not only is there none in existence, but there is none that could exist even in abstract. The inherent problem of absolute justice is that it can not be achieved -- even if society could allocate unlimited resources and administer infinite levels of appeals. In the absence of a perfect protection against arbitrariness, the best available and practically feasible safeguard is the requirement of a complete and clearly stated opinion, *readily available for public scrutiny*. It is *this only feasible safeguard* that rule 36 effectively disables.

Allowing the Appellate Court to cover its rulings in a shroud of secrecy, rule 36 enables and legalizes the arbitrariness and violates the fourteenth amendment and, in accordance with 28 U.S.C.§ 2072(b), should not be in force.

The present case is a fine example of how far the current legal process can deviate from the noble goal of administering justice -- within the guiding Rules of Federal Civic and Appellate Procedure. Acting in accordance with the rules,

District and Appellate Courts in the present action ignored well established law, distorted evidence and gave a new definition to the concept of "honesty" (concluding in effect that "lying" is "honest"[4]).

The writ of certiorari should be granted in this case because it presents the questions of utmost importance, that have the potential to impact each litigant and every case. If these questions are not answered, no one in this country should be allowed to enter litigation without a clear understanding of the process and its dangers. If judicial accountability is not built into an appeal, the prospective litigants must be made aware that the large emotional and financial investment they put into a lawsuit[5] may be subject to unlimited discretion and *an arbitrary decision* by a District Judge, *without a real right for appeal*. Such a warning would be necessary as a matter of providing consumer protection, similarly to the warning of the danger of smoking which the tobacco industry is required by law to print on its products.

The following will use the present case to illustrate how rule 36 of Federal Rules of Appellate Procedure and the practice of unpublished opinions legalize the arbitrariness in the Federal Court.

1. **Appellate Court distorted evidence presented in the record on appeal and used this false evidence to affirm the District Court's decision - well within the rules of law.**

The distinguished United States Senator, Daniel Patrick Moynihan expressed the common understanding of the objective quality of "facts" as follows: "Everyone is entitled to

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4. By the same token, both courts could have come to any conclusion, no matter how ludicrous - and bury such a conclusion in the common grave of unpublished opinions. Even if the courts decided that 2 + 2 = 5, or that the Earth is flat, the plaintiff would have no legal recourse to disprove it. The motion for rehearing could be denied, and the review of writ of certiorari is not a matter of right.

5. For instance, the plaintiff in the present case spent seven years and around $200,000 on the litigation.

his own opinion *but not his own facts*". Nowhere is the importance of factual truth as apparent as in law. The witnesses caught in fabrications can be found guilty because it undermines their credibility and the accuracy of their testimonies. That *no one* is entitled to his own version of facts applies to Federal Judges as well. However, the panel that processed the second appeal intentionally distorted the evidence presented in the record on appeal and misquoted the plaintiff. For instance, the summary order (App. B) cited the following "facts" which contradict the record on appeal

(a) The plaintiff *admitted* that she received O'Neil's memo of September 20, 1990;

(b) The plaintiff *admitted* that she could be perceived as "highly critical" of her management;

(c) The project about which the plaintiff inquired at the TQM meeting with Strickler was canceled "*because of cost*".

The summary order (App. B) uses these alleged "facts"to endorse the District Court's decision that CIGNA's VALUEs and TQM campaign were not false and that plaintiff's probation was justified. However, not only did the plaintiff not admit to anything like the alleged "facts" (a) and (b) above, but she testified under oath *to the opposite* and the testimonies are included in the record on appeal . The "fact" (c) is not supported by *any evidence on the record* and is a fiction created by the Appellate Court.

Even if one gives the Appellate Court the benefit of the doubt that the distortions were not initially intentional, the plaintiff's motion for rehearing presented clear proof that the "facts" *were false* and should have alerted the Appellate Court. This, however, did not happen. The motion for rehearing had been denied - without an explanation - and the summary order itself in accordance with rule 36 has not been published and is not available in the FindLaw database.

Considering that review on a writ of certiorari is not a matter of right, but of judicial discretion, the Appellate Court's summary order essentially concluded what was supposed to be the "due" process. This process was void of any means of

accountability and allowed the distortions of evidence as a matter of law.

2. **Rule 36 permitted Appellate Court to ignore issues presented on appeal.**

The Appellate Court's summary order in the present case affirmed the ruling of the lower court because, as Judge Calabresi stated during the oral argument: "... we have to rely on district court's judgment to determine in terms of the running a case...I don't know enough about it to make a sensible judgment." It is well established in law that the District Court has an unlimited discretion in deciding all pre-trial and trial matters. However, Appellate Court's opinions instruct that "Although Rule 403 has placed great discretion in the trial judge, discretion does not amount to immunity from accountability" U. S. v. Dwyer, 539 F.2d 543, 550 (2d Cir. 1976), "'Although trial court is given a broad discretion under Fed. Rule Evidence 403, discretion does not mean immunity from accountability, and appellate court will overturn abuses of discretion if trial court acts arbitrarily or irrationally'; citing Weinstein" U.S. v. Jamil, 707 F 2d. 638, 642 (2d Cir. 1983) The only problem with these statements is that the Appellate Court is under no obligation to abide by them - particularly if it is not required to publish its opinion and explain its reasoning for everyone to see.

In the present matter, for instance, in the appeal brief on both counts of negligent misrepresentation, the plaintiff presented an argument that the District Court excluded all the relevant evidence introduced in the plaintiff's opposition to CIGNA's motions for summary judgment. The plaintiff argued that the District Court endorsed the defendants version of fact and consequently arrived at the defendant's conclusion. The Appellate Court chose to ignore the issue of excluded evidence, thus leaving arbitrary decisions of the lower court without review - well within the rules of Appellate Court, specifically, Rule 36. However, the fourteenth amendment defines the "due process" as one that " must be adapted to the end to be attained; and whenever nec-

essary to the protection of the parties, *it must give them an opportunity to be heard* respecting the justice of the judgment sought." [emphasis added] Accordingly, Rule 36, which enables a ruling that silences one of the parties, is not a "due process".

3. **Rule 36 permitted Appellate Court to redefine the historically and linguistically established meaning of words and concepts - such as "honesty", "openness".**

Webster's dictionary gives the following definition of the word *honest* - "not lying, cheating or stealing". The District and Appellate Courts, effectively redefined it and concluded that "lying" is "honest". Both Courts ruled that CIGNA's memoranda about "honest and open communication" was not false, even though the record on appeal showed that plaintiff's direct supervisor Jeff O'Neil acknowledged that *he was lying* in the probation documents about plaintiff's alleged problems with users by admitting in the "Personal and Confidential" letter to HR that plaintiff *had good relationship with her users*. It is much less likely that the Appellate Court would offer the same reasoning if it had to articulate it in a published opinion to become a precedent in common law.

4. **Rule 36 and the practice of "unpublished" opinion permitted Appellate Court to disregard well settled law.**

The correct summary judgment standard is comprehensively stated in decision LaFond v. General Physics Services Corp., 50 F.3d. 165,171 (2d Cir. 1995). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). In assessing the record to determine whether there is a genuine issue as to any material fact, the trial court is required to resolve all ambiguities and draw all inferences in favor of the party *against whom summary judgment is sought*. [emphasis added] Gallo v. Prudential Residential Servs, 22 F. 3d 1223 (2d Cir., 1994); Donahue v. Windsor Locks Bd. of Fire Comm'rs. 834 F. 2d. 54

(2d Cir., 1987). "The inferences to be drawn from the underlying facts revealed in materials . . . must be viewed in a light most favorable to the party opposing the motion."; accord Cronin v. Aetna Life Ins. Co., 46 F. 3d 196, 202-03 (2d Cir. 1995); Ramseur v Chase Manhattan Bank, 865 F. 2d at 460, 465 (2d Cir. 1989);

As explained in LaFond v. General Physics Services Corp., the role of the district judge at the summary judgment stage is a limited one: " The trial court's task at the summary judgment motion stage . . . is carefully limited to determining whether there are any genuine issues . . . not to deciding on them". See also Gallo v. Prudential Residential Servs.: 'If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper.' Chambers v. TRM Copy Ctrs. Corp., 43 F. 3d 29, 37 (2d Cir., 1994) [emphasis supplied].

In determining whether a genuine issue of material fact is in dispute, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

The law could not be more clear, yet both District and Appellate Courts ignored it with astonishing ease. Not only they did not view the plaintiff's evidence in most favorable light, they *did not view it at all*. Rule 36 and the practice of unpublished opinions allowed the ruling that contradicted the law to be entered quietly, unknown to public and legal community and expressly excluded from precedential reference.

5. **"Unpublished" opinions invalidate the essence of common law and the substance of the case law doctrine.**

There are many problems with "unpublished" opinions. The rational for using them is the increased caseload and volume of information. The additional reasoning suggests that not all cases contribute to the advancement of the legal process and that the influx of pro se cases makes meaningful legal argument impossible. Although both ideas might have

some merit[6], they can not overturn the fact that the practice of using "unpublished" opinions is unconstitutional and therefore unacceptable. If the caseload is too large for the American legal system to be processed in accordance with the law, than it means that the United States can not afford its law[7] and the law should be changed. The reasoning that not all cases contribute to the advancement of the legal process, also violates the Fourteenth Amendment because it implies that some cases are less important than others. The drawbacks of this practice are grave, and the present case is a fine illustration:

(a) *The unpublished opinions violate the law of the case doctrine, which underscores the importance of the precedent and the consistency of the legal process:*

"It would be utterly destructive of this end if each successive decision resulted in the reconsideration of every previous one and a sequence of decisions in the same case based on different views of overlapping issues of law would likely result in a internally inconsistent judgment. To avoid the horns of this dilemma, it is the practice to treat each successive decision as establishing the law of the case and depart from it only for convincing reasons." *1B Moore's Federal Practice (2d Ed.)* ¶ *0.404[4-1]*

"Even if Rule 56(b) did allow a party to request a reconsideration of an earlier ruling, it would have to be done within the guidelines of the law of the case doctrine, and in the instant case, there was no new evidence, change of law or other reason to justify reconsideration." Virgin Atl. Airways v. National Mediation Bd., 956 F. 2d 1245 (2d Cir. 1992).

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6. Even though pro se briefs may lack the structure required of a legal documents, they nevertheless provide the input that allows Courts to come to certain conclusions and dispose of them. It is not clear why the reasoning process that takes place to arrive at a conclusion can not be verbalized in a published opinion and be open to public scrutiny.

7. The restriction on publication is particularly alarming at the age of Internet, cheap computer memory and powerful search engines that process gigabytes of information in a matter of seconds. Even if paper publication was too expensive, there is no justification to withhold electronic availability of all opinions, and, for that matter, the appeal briefs and oral arguments as well. In fact, Eighth Circuit is currently doing just that.

The unpublished opinions allow an entry of a conflicting opinion in the same case without public exposure. In the present matter, for instance, the summary order issued by a different panel of the same Appellate Court effectively presented a view clearly opposite to the opinion in the same case in Chertkova v. Connecticut Gen. Life Ins. Co., even though there was nothing new in the evidence. See Chertkova:

"In the present case , Chertkova presented evidence sufficient to overcome a motion for summary judgment on the question of constructive discharge. *That proof reveals plaintiff's working conditions were made intolerable by O'Neil, her supervisor, and by his boss, Craig May.* O'Neil yelled at her in insulting terms during the coaching sessions purportedly aimed at improving her communication skills, telling her, 'What do you hope for? Do you think you are going to outlive us? There is no chance! You are not going to be here!' He also told plaintiff she was 'too expensive,' and mocked her when she attempted to explain she was at the bottom of the pay range for her position. In addition, plaintiff's proof allows the inference that she was treated arbitrarily and severely criticized despite her strong performance. *A factfinder could infer, from the facts set forth in the affidavits and deposition testimony, that plaintiff was among the most competent employees in the Operation Engineering department and that although her interpersonal skills once left something to be desired, they had improved and were perfectly adequate.* Further, although she had successfully completed probation, she was told she would be fired immediately if, over the course of two years, she did not maintain satisfactory performance levels, demonstrate satisfactory behavior, and improve her listening skills, *which might be viewed as using her undoubted technical competence at work so long as she only listened and never spoke.*" [Emphasis added]

"*Plaintiff's evidence suggests her supervisor engaged in a pattern of baseless criticism.*" (Emphasis added)

"*...the evidence, in addition, would also allow a factfinder to conclude that May and O'Neil deliberately created unbearable working conditions for the purpose of forcing Chertkova out of the company.*" [Emphasis added]

"Plaintiff acknowledges that later meetings, reprimands, and coaching sessions were indeed held, but she presented enough evidence to justify the belief that her performance ñ including her conduct vis-a-vis management and her relations with customers ñ was wholly adequate or *even superior. This evidence includes not only her own affidavit, but also affidavits of and deposition testimony of other employees.* That the proffered motive was a pretext is further supported by O'Neil's alleged threats at the coaching sessions, Quirk's rewrite at May's instigation of a formerly 'excellent' evaluation, and the denial of plaintiff's request to attend a course on communication which she claims was available to all other employees."

However, the unpublished opinion on the second appeal tells a different story:

" . . . the undisputed evidence shows that the representations made by management (about its communications policy) were not false. A policy of 'encouraging open, honest, and constructive (emphasis added) communications at all levels', particularly one coupled with a premium on dignity and respect, is not at odds with a policy of discouraging potentially blunt, unpleasant criticisms of a specific manager or management in public setting. . . Indeed, the compatibility of these two positions should have been clear to plaintiff given O'Neil's September 20,1990 memo to her, explaining that she should 'find more positive methods for bringing her concerns to management. . .' Under these circumstances, *any discipline of Chertkova for her statements at the TQM meeting was in fact consistent with its open communication policy.*[8] [Emphasis added]"

(b) *The unpublished opinions allow the "back door" entry for the conclusions that conflict with the doctrine of a precedent.*

In a recently *published* opinion Howley v.Town of Stratfort and William Holdsworth the same Appellate Court decided that it is impermissible for a judge to resolve issues of fact and

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8. As discussed earlier, plaintiff denied ever seeing this document and published opinion in Cherkova included it into its facts.

exclude relevant evidence:

"On appeal, Howley contends principally that the court impermissibly resolved issues of fact that should have precluded the entry of summary judgment on her failure-to-promote claim, and disregarded pertinent evidence in support of her hostile-work-environment claim. For the reasons that follow, we agree, and we vacate the judgment of the district court and remand for further proceedings."

Yet, in *unpublished* opinion in the present case Appellate Court effectively endorsed the exclusion of evidence and *resolved all issues of fact.*

(c) *An "unpublished" opinion makes it easy to use different standards in the same opinion.*

The recent opinion in Hurley v Atlantic City Police Dep't, 174, F.3d 95(3d Cir., 1999) held that the evidence of past sexual harassment has high probative value and is relevant, even if it goes twelve years back. In the present case, the Appellate Court concluded in its summary order, contrary to Hurley that the evidence of sexual harassment eleven years ago is irrelevant, because *it is too remote.* Instead it relied on Perry v. Ethan Allen, Inc., 115 F.3d 115 (2d Cir. 1997) where evidence *earlier than six months* was considered too remote:

"*See Perry,* 115 F.3d at 150 (upholding district court's decision to exclude evidence of sexual harassment of plaintiff's coworkers occurring *earlier than six months* before plaintiff herself experienced harassment because such incidents "were too remote to have probative value")" [emphasis added]

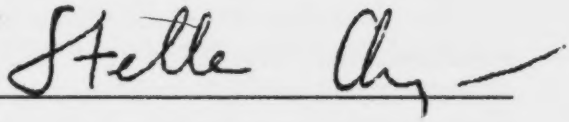
However, the plaintiff's admission that she had a reputation for being difficult before 1985 - *seven years before she was terminated - was not too remote* to be used in the summary order against her. Nothing in the evidence could redeem this conclusion: the fact that plaintiff received promotions despite this reputation, the plaintiff's clarifications that she initially acquired this reputation because she came from a very different culture and, most important, the evidence that plaintiff worked hard on changing this reputation and that by 1990 she completely turned it around.

Thus, not only the unpublished opinion disregarded the standard set by the Third Circuit and used its own *six months standard* instead, but it contradicted this very standard in the same opinion. It is hard to conceive that it could be done as casually in a published opinion with precedential authority..

## CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,



Stella Chertkova

37 Farms Village Rd.
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**Exhibit A**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 1139 -- August Term 1995
(Argued March 19, 1996 Decided August 9, 1996)
Docket No. 95-7849

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STELLA CHERTKOVA,
Plaintiff-Appellant,
v.
CONNECTICUT GENERAL LIFE INSURANCE CO.,
Defendant-Appellee.

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Before: FEINBERG, CARDAMONE,
and MAHONEY, Circuit Judges

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Stella Chertkova appeals from an order in her action brought under Title VII of the Civil Rights Act of 1964, alleging she was discharged because of her gender. The United States District Court for the District of Connecticut (Covello, J.) granted summary judgment in favor of defendant Connecticut General Life Insurance Co.

Reversed and remanded.

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STEVEN D. ECKER, Hartford, Connecticut (Cowdery & Ecker, Hartford, Connecticut, of counsel), for Plaintiff Appellant Stella Chertkova.

JAMES B. HERMAN, Philadelphia, Pennsylvania, for Defendant- Appellee Connecticut General Life Insurance Co.

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CARDAMONE, Circuit Judge:

Stella Chertkova appeals from an order of the United States District Court for the District of Connecticut (Covello, J.), entered July 25, 1995, granting summary judgment in favor of defendant Connecticut General Life Insurance Co. (defendant, Connecticut General, or employer). The issue presented is the propriety of granting summary judgment on plaintiff's claim that her former employer discharged her because of her gender in violation of Title VII of the Civil Rights Act of 1964.

Plaintiff charged in her complaint, in substance, that managers in one of defendant's departments did not tolerate intelligent and articulate female subordinates. Instead, she claims, they insisted on maintaining a work environment where, in the words of Jane Austen, "[a] woman especially, if she have the misfortune of knowing anything, should conceal it as well as she can." Jane Austen, Northanger Abbey 94 (Signet Classic ed. 1965). This alleged treatment of a woman employee is a bête noire under Title VII and is conduct the civil rights law aimed to end.

Chertkova contends these managers engaged in a campaign of harassment to cause her to lose her employment because of her gender. The employer avers that plaintiff's employment terminated because of long-standing performance deficiencies, including an alleged inability to communicate effectively with customers and scornful treatment of company managers. The record also reveals disagreement as to whether plaintiff quit, was terminated, or was compelled to leave by intolerable working conditions. Because these questions present issues of material fact, we reverse the grant of summary judgment and remand this case for trial.

BACKGROUND

A. Plaintiff's Employment Experience

Stella Chertkova was hired by Connecticut General as a computer programmer in 1979, and for over ten years held various computer-related posts in its Operations Engineering department, including the positions of Technical Consultant and Senior Systems Consultant, working under a number of different supervisors. Her work required that she deal with "customers" within the company, that is, those Connecticut General employees who used the systems she helped design. Because plaintiff allegedly needed help in interpersonal relationships with peers and customers, her supervisor Patricia Endweiss "coached" her in 1989 and 1990 to improve her communication skills. Thereafter - - as observed by coworkers Robert Godin and Mary Bosch - - her interaction with others improved dramatically.

Plaintiff's high level of technical competence was widely recognized within the company. Endweiss commented in a March 1990 evaluation that Chertkova quickly assimilates technical information, always presents a well thought-out technical design, and consistently offers efficiencies above and beyond requirements. Supervisor Michael Rocchio stated that she well understood the technology associated with her work. Co-employee Adrienne Burnett described her technical skills and knowledge of computer systems as excellent, and she was given a company award in 1989 for her handling of a complex project.

In mid-1990 Craig May took over the Operations Engineering department and told plaintiff to report to Jeff O'Neil, a project manager, instead of her then-supervisor Patricia Endweiss. According to former Connecticut General manager Melanie Konicki, O'Neil was not competent and had difficulties in dealing with "assertive and competent" women. Nonetheless, May quickly promoted O'Neil. Endweiss, who along with plaintiff was considered to be among the most technically competent persons in the department, was placed on probation for exhibiting a "lack of active listening skills," and was

terminated in January 1992.

Meanwhile, Chertkova asserts, May and O'Neil began a campaign of harassment calculated to force her out of her job. According to Konicki's affidavit, "it was a recognized practice . . . to document a pattern of failure in order to get rid of an undesirable employee." Plaintiff declared that during May's first year as department head, he never spoke to her about professional matters but frequently stopped by her office for personal reminiscences, mostly "macho" stories relating his experiences with women. He also called her a "clotheshorse." In the summer of 1990 Chertkova attended a presentation to introduce employees to her employer's parent company CIGNA's "Operating Values" project, with its emphasis on "People, Quality, Teamwork, Leadership, [and] Knowledge." According to plaintiff, she asked some questions but did not embarrass the CIGNA representative or anyone else. Defendant asserts that plaintiff acted in a disruptive manner, asking critical and inappropriate questions about management.

In early 1991 CIGNA introduced the concept of "Total Quality Management" (TQM), which avowedly allowed employees "to express their ideas and opinions openly and honestly at all levels." Chertkova attended an Operations Engineering meeting led by Bob Strickler, Craig May's immediate superior, for the purpose of discussing TQM. She made a number of comments and posed several questions, but insists that none of her comments were inappropriate or negatively intended or received. A few weeks later, however, O'Neil placed her on an informal "performance improvement plan" to address such areas as "active listening skills." Although she was taken to task for her comments at the Strickler meeting, male employees who challenged Strickler - - even one who became "visibly angry" with Strickler's answers - - did not receive the same harsh treatment. Chertkova believes this differing response from management is evidence that women in the department were treated differently than men.

During the first three years of May's tenure as head of the department, two of the three women who were terminated (that is, plaintiff and Endweiss) were terminated for "communication" reasons. No men were fired during this period. After this litigation was instituted, three men were discharged, but none for lack of communication skills. Plaintiff also charges that May advanced men such as O'Neil, despite his lack of technical competence, and promoted two women who were without technical training while he terminated plaintiff and Endweiss, who were among the most competent employees in the department.

In the summer of 1991 O'Neil held "coaching sessions" with Chertkova. In her affidavit she relates that he "called her into an office with closed doors and berated and yelled at [her] for hours." During these meetings O'Neil threatened her, saying: "What do you hope for? Do you think you are going to outlive us? There is no chance! You are not going to be here!" After one such session, plaintiff left in tears and went to see June Cocolla, the division personnel officer, who promised to intervene and subsequently did attend a coaching session. O'Neil became very angry with Cocolla for providing assistance to plaintiff. Cocolla's efforts to be supportive soon ended, although she later sent plaintiff a book entitled You Just Don't Understand: Men and Women in Conversation, which discusses differences in women's and men's communication styles and the problems resulting from those differences.

Later that summer O'Neil placed Chertkova on formal probation, the conditions of which included: "demonstrat[ing] the behaviors intrinsic to the published teamwork Operating Values," giving dissenting opinions "constructively and in the appropriate, private setting," and improving "written communications," and "active listening skills." Plaintiff successfully completed probation in October 1991, but was told she could be fired immediately or at any time during the next two years if she did not "maintain satisfactory performance" in a

number of specified areas, including improving her written and "verbal communications." Yet, when Chertkova asked to attend a course on "communication skills" offered to all other department employees, her request was denied. In late 1991 plaintiff was reassigned to Supervisor Teresa Quirk, who wrote an "excellent" performance evaluation of plaintiff in December, but told plaintiff in January that Craig May - - whom Quirk said she feared - - found the appraisal of plaintiff "too good" and ordered Quirk to rewrite it.

B. Plaintiff's Employment Ends

Plaintiff discovered on March 5, 1992 that her supervisor was soliciting other company employees for negative information about her. On that same day, she suffered a nervous breakdown and left work. She never returned. As it happened, Teresa Quirk had prepared a letter of termination dated March 6, 1992 that referred to plaintiff's purported failure to live up to the admonitions that followed her probation and her failure to complete in a timely fashion a recent assignment for O'Neil. Chertkova said she did not receive the letter at that time.

Following her breakdown, plaintiff applied for and received short-term disability benefits from Connecticut General for a period of 26 weeks. During the summer of 1992 she worked on a proposal for automating administrative functions at CIGNA and submitted it through the "Employee Suggestion Plan." The submission was rejected. She maintains that her efforts to communicate with her employer were turned aside. At a deposition in January 1993 relating to her worker's compensation claim, plaintiff first learned of the March 6, 1992 termination letter.

C. The District Court's Decision

As a result, she filed a discrimination charge with the Equal

Employment Opportunity Commission (EEOC), which issued a notice of right to sue on July 19, 1993. Plaintiff initiated the instant action on October 12, 1993. On August 16, 1994 Quirk wrote a letter to plaintiff stating she was terminated as of August 12, 1994, based upon the fact that her request for long- term disability benefits had been denied, that she did not intend to return, and that she had taken another job. In its motion for summary judgment, defendant contended that no conduct of May's evidenced gender bias against plaintiff. It noted that May promoted two female managers -- Teresa Quirk and Lucille Davis - - and maintained that Chertkova's performance deficiencies were well-documented. Although she disagreed with the alleged performance deficiencies, defendant notes that she admitted she was difficult to work with, had contempt for management, and told others within the company that her managers were incompetent.

Granting summary judgment for defendant, the trial court ruled that plaintiff had failed to establish a prima facie case of employment discrimination. It held that plaintiff was not discharged from her employment, reasoning that her working conditions were not so intolerable that a reasonable person would have felt compelled to leave. It characterized plaintiff's case as being one that relied on unfair performance evaluations, cold treatment by management, management's failure to give her a performance award, and her belief that she was overworked. None of these circumstances sufficed, in the district court's view, to show a constructive discharge. It also ruled that plaintiff failed to establish a prima facie case because she did not demonstrate "that her position remained open and that the defendant continued to seek applicants."

Assuming that a prima facie case existed, the district court further stated that defendant had articulated a legitimate reason for terminating Chertkova -- deficient performance -- and that because plaintiff relied on conclusory allegations of dis-

crimination, no genuine issue of material fact existed with respect to whether the proffered reason was a pretext for gender discrimination. From this decision, Chertkova appeals.

DISCUSSION

I General Standards Applicable

A. Summary Judgment

We have repeated the rules governing summary judgment frequently, so only a brief comment is necessary. Such relief may be granted only when the movant carries its burden of demonstrating there is no genuine issue of material fact for trial, and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). No genuine issue exists if, on the basis of all the pleadings, affidavits and other papers on file, and after drawing all inferences and resolving all ambiguities in favor of the non-movant, it appears that the evidence supporting the non-movant's case is so scant that a rational jury could not find in its favor. See Gallo v. Prudential Residential Servs., Ltd. Partnership, 22 F.3d 1219, 1224 (2d Cir. 1994).

In prior cases, we have also emphasized that trial courts must be especially chary in handing out summary judgment in discrimination cases, because in such cases the employer's intent is ordinarily at issue. See, e.g., Gallo, 22 F.3d at 1224; Montana v. First Fed. Sav. & Loan Ass'n, 869 F.2d 100, 103 (2d Cir. 1989). Since it is rare indeed to find in an employer's records proof that a personnel decision was made for a discriminatory reason, whatever other relevant depositions, affidavits and materials are before the district court must be carefully scrutinized for circumstantial evidence that could support an inference of discrimination. See Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 37 (2d Cir. 1994).

B. Shifting Burdens of Proof

The disposition of employment discrimination actions is governed by standards of proof set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798, 802-05 (1973), which are intended "progressively to sharpen the inquiry into the elusive factual question of intentional discrimination," Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981). The aggrieved employee bears the initial burden of establishing a prima facie case of unlawful discrimination. McDonnell Douglas, 411 U.S. at 802. This burden is light. See Burdine, 450 U.S. at 253. Where the alleged discrimination arises from an employer's refusal to hire the plaintiff, for example, a prima facie case may rest upon proof that the plaintiff (1) is a member of a protected class, (2) applied for the subject position and was qualified to hold it, (3) was rejected, and (4) the position thereafter remained open and defendant "continued to seek applicants from persons of complainant's qualifications." McDonnell Douglas, 411 U.S. at 802. As discussed in greater detail below in Part II B., this final requirement can be satisfied in different ways. Id. at 802 n.13.

If the plaintiff successfully proves a prima facie case, a presumption of unlawful discrimination arises. See Burdine, 450 U.S. at 254; see also St. Mary's Honor Center v. Hicks, 509 U.S. 502, 508-520 (1993). The burden of production then shifts to the employer, which must articulate a legitimate reason for the challenged employment decision, see Burdine, 450 U.S. at 254; McDonnell Douglas, 411 U.S. at 802, and, if it does so, plaintiff must be allowed to show that the proffered reason was pretextual, and that the real reason was discriminatory. See Hicks, 509 U.S. at 515. The factfinder must decide whether plaintiff carried her ultimate burden of persuasion with respect to whether "the defendant intentionally discriminated" against her based on the unlawful criterion. Id. at 511. These shifting burdens of proof apply in this case involving alleged discrimination on account of gender.

Connecticut General argues that plaintiff failed to make out a prima facie case because she was not discharged and because she did not show that her position remained open following her alleged termination and that defendant continued to seek other applicants. Defendant also declares that plaintiff was unable to demonstrate that its proffered nondiscriminatory reason -- deficient performance - - was pretextual.

II Gender Discrimination - - Prima Facie Case

A. Discharge From Employment

One of the elements of a prima facie case of discriminatory discharge, as one might expect, is that the employee was discharged. See 42 U.S.C. [[section]] 2000e-2(a)(1) (unlawful employment practice "to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin"). This element may be satisfied by a showing of an actual or a constructive discharge. See Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1188 (2d Cir. 1987); Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983).

1. Whether Actual Discharge Issue is Reviewable

An actual discharge, in the context of Title VII as in other contexts, occurs when the employer uses language or engages in conduct that "would logically lead a prudent person to believe his tenure has been terminated." NLRB v. Trumbull Asphalt Co., 327 F.2d 841, 843 (8th Cir. 1964) (Blackmun, J.); see also NLRB v. Hale Mfg. Co., 570 F.2d 705, 708 (8th Cir. 1978) (whether an employee has been discharged depends on the reasonable inference an employee could draw from what her employer said); NLRB v. Ridgeway Trucking Co., 622 F.2d 1222, 1224 (5th Cir. 1980) (same); NLRB v. Hilton Mobile Homes, 387 F.2d 7, 9 (8th Cir. 1967) (same); Liberty Mut. Ins. Co. v. NLRB, 592 F.2d 595, 604 (1st Cir. 1979) (Hale test generally accepted). Inquiry focuses on the reasonable perceptions

of the employee, not on whether formal words of firing were in fact spoken. See Ridgeway Trucking, 622 F.2d at 1224; Trumbull Asphalt, 327 F.2d at 843.

Connecticut General maintains Chertkova waived the actual discharge argument by failing to present it to the district court. Concededly, plaintiff's filed papers did not clearly present the issue. Plaintiff did, however, draw the trial court's attention to evidence relevant to that issue. She pointed out that the evidence showed that the defendant engaged in a continuing course of conduct of taking adverse employment actions against her, beginning with negative performance evaluations, continuing with pre-probation and probation status, and ending in defendant's announced intention to terminate her employment.

Setting forth these facts should have sufficiently alerted the district court that the possibility of an actual discharge might have precluded summary judgment. Although we ordinarily will not review an issue the district court did not decide, whether we do so or not is a matter within our discretion. See Singleton v. Wulff, 428 U.S. 106, 120-21 (1976). We think this case an appropriate one for exercising discretion to entertain the actual discharge argument. Based upon the materials presented in the parties' motion papers, the purely legal question of whether summary judgment was warranted with respect to the required showing of a discharge may be properly evaluated. See Bornholdt v. Brady, 869 F.2d 57, 68 (2d Cir. 1989) (entertaining argument where district court's attention was directed to the facts pertinent to the argument and only legal questions were at issue); Rebaldo v. Cuomo, 749 F.2d 133, 137 (2d Cir. 1984) (circumstances make it appropriate to entertain argument on appeal not raised below), cert. denied, 472 U.S. 1008 (1985).

2. Merits of Actual Discharge Issue

We decide now whether there exists a genuine factual question respecting actual discharge, an issue both parties argue on appeal. Plaintiff insists she was discharged when defendant made a final termination decision set forth in a letter to her dated March 6, 1992. She further declares that even if defendant did not officially discharge her, she was not welcome to return and did not return to her job. She maintains it is irrelevant that defendant continued to pay her disability benefits after she stopped going to work. Finally, she argues that defendant's letter dated August 16, 1994 -- prepared after this litigation commenced, and which she did receive -- effected a discharge.

Although the March 6, 1992 letter clearly did not terminate Chertkova's employment when first prepared because it was not delivered to plaintiff, a reasonable jury might find an actual discharge occurred then. First, defendant does not adequately counter plaintiff's evidence suggesting that defendant led her to believe she was not welcome to return. Chertkova states that defendant ignored a claim for disability benefits made six months after she stopped coming to work, and that one of defendant's employees called her at home and asked her insulting questions relating to her symptoms, but was uninterested in discussing plaintiff's "working environment." Further, during this period Connecticut General turned aside plaintiff's efforts to reestablish communication with it.

These facts, along with the events preceding plaintiff's decision to leave - - for example, the 1991 "coaching sessions" where O'Neil told her "You are not going to be here!" and Quirk's surreptitious solicitation of negative feedback in March 1992 - - lead us to conclude that a reasonable person in Chertkova's shoes might have thought she was in fact discharged after March 6, 1992, despite the fact that she had not received her official letter of termination. Defendant relies on proof indicating that plaintiff, after March 6, took advantage

of benefits and programs available only to employees. But such evidence does not dispose of the issue of actual discharge. Assuming it is relevant to plaintiff's reasonable perceptions of defendant's actions and words, it simply suggests the issue is disputed. Moreover, the termination letter of August 16, 1994 - - although delivered after the litigation began - - would clearly have effected a termination if the employment relationship had indeed lasted that long, a question that must be resolved by the factfinder.

The foregoing discussion makes clear that material issues of fact remain genuinely disputed. As such, to grant summary judgment would require a court to decide a disputed fact - - something beyond its compass at this stage of the litigation. See Gallo, 22 F.3d at 1224. Thus, the question of whether Chertkova was actually discharged is not susceptible on this record to resolution by summary judgment.

3. Constructive Discharge

For similar reasons, we think summary judgment inappropriate with respect to the issue of constructive discharge. Constructive discharge of an employee occurs when an employer, rather than directly discharging an individual, intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily. See Pena, 702 F.2d at 325. Working conditions are intolerable if they are "so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Lopez, 831 F.2d at 1188 (quoting Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir. 1977)).

In the present case, Chertkova presented evidence sufficient to overcome a motion for summary judgment on the question of constructive discharge. That proof reveals plaintiff's working conditions were made intolerable by O'Neil, her supervisor, and by his boss, Craig May. O'Neil yelled at her in insulting

terms during the coaching sessions purportedly aimed at improving her communication skills, telling her, "What do you hope for? Do you think you are going to outlive us? There is no chance! You are not going to be here!" He also told plaintiff she was "too expensive," and mocked her when she attempted to explain she was at the bottom of the pay range for her position.

In addition, plaintiff's proof allows the inference that she was treated arbitrarily and severely criticized despite her strong performance. A factfinder could infer, from the facts set forth in the affidavits and deposition testimony, that plaintiff was among the most competent employees in the Operations Engineering department and that although her interpersonal skills once left something to be desired, they had improved and were perfectly adequate. Further, although she had successfully completed probation, she was told she would be fired immediately if, over the course of two years, she did not maintain satisfactory performance levels, demonstrate satisfactory behavior, and improve her listening skills, which might be viewed as using her undoubted technical competence at work so long as she only listened and never spoke.

We recognize that a disagreement with management over the quality of an employee's performance will not suffice to establish a constructive discharge. See, e.g., Stetson v. NYNEX Serv. Co., 995 F.2d 355, 360 (2d Cir. 1993). But here there is more than a disagreement over quality. Plaintiff's evidence suggests her supervisor engaged in a pattern of baseless criticisms, said she would not "be around," and that she would be fired instantly if she did not meet certain ambiguous behavior objectives. In Lopez, we held that telling plaintiff he would be fired following probation, "no matter what he did to improve his allegedly deficient performance," was sufficient alone to support a finding of constructive discharge. See 831 F.2d at 1188. Similarly, a reasonable person in Chertkova's position might have inferred from the circumstances, including

the onslaught of unfounded criticism coupled with the threat of immediate termination, that she was compelled to leave.

An inference that the conditions were intolerable is further bolstered by the fact that plaintiff's former supervisor, Patricia Endweiss, was terminated for reasons similar to those that allegedly formed the basis for O'Neil's disapproval of plaintiff. Moreover, the timing of Chertkova's nervous breakdown - - although the cause is disputed -- suggests a connection between plaintiff's work conditions and her decision to leave. Although the factfinder ultimately may or may not decide that Chertkova reacted reasonably, a finding of constructive discharge would be supported by the fact that plaintiff had a breakdown on the day before her discharge letter was to be delivered.

The evidence, in addition, would also allow a factfinder to conclude that May and O'Neil deliberately created unbearable working conditions for the purpose of forcing Chertkova out of the company. One former employee -- Melanie Konicki -- stated in an affidavit that creating intolerable conditions to force unwanted employees to quit was a recognized practice of defendant's managers. Connecticut General dismisses this evidence as irrelevant because Konicki had no personal knowledge of how plaintiff was treated, but her statement lends support to plaintiff's theory that her supervisors - - who were defendant's managers - - engaged in such tactics. She was told nearly a year before the March 1992 termination letter that she would not survive there. Were the communication skills problems and other alleged performance deficiencies indeed concocted by May and O'Neil - - a permissible inference based upon the evidence described above - - a factfinder might further find that plaintiff's managers actively sought to compel her to resign.

The district court ruled that plaintiff's proffered proof of the following work conditions was insufficient to establish a con-

structive discharge: (1) her disagreement with her managers' evaluation of her work performance; (2) cold treatment by her supervisors; (3) managers' failure to give her a performance award; and (4) that she was overworked. We think this summary of the evidence understates the severity of the conditions to which plaintiff claims she was subjected. Chertkova presented evidence indicating not only that she was treated coldly and arbitrarily, but also (among other things) that her supervisor yelled at her, told her she would not survive, and held over her like a sword of Damocles a threat of immediate termination.

It is true that if only one of the work conditions enumerated by the district court were present, it might not be enough to demonstrate constructive discharge. Certain factors, standing alone, are legally insufficient to support constructive discharge. See, e.g., Stetson, 995 F.2d at 360 (dissatisfaction with assignments; employee's perception of undue criticism or excessive monitoring; difficult or unpleasant conditions); Pena, 702 F.2d at 325 (disagreement with work plan). But the effect of a number of adverse conditions in the workplace is cumulative. A constructive discharge occurs if a reasonable person subjected to the same conditions as the plaintiff would have felt compelled to step down. Because a reasonable person encounters life's circumstances cumulatively and not individually, it was error to treat the various conditions as separate and distinct rather than additive. Viewed as a whole, the facts in the case at hand, if proven, would permit a finder of fact to conclude that Chertkova was forced to resign.

For all these reasons, and in view of our prior decisions holding that the plaintiff's burden of establishing a prima facie case in a discrimination suit is "de minimis," see, e.g., Chambers, 43 F.3d at 37, the district court's grant of summary judgment on the issue of constructive discharge may not stand.

B. No Requirement to Find Other Applicants

We turn next to defendant's contention that the plaintiff must show that the defendant kept the position open after Chertkova's termination and continued to seek other applicants. Because it contradicts established precedent, we decline to adopt this proposition. As noted earlier, in presenting a prima facie case of discriminatory discharge the plaintiff must present proof that her discharge occurred in circumstances giving rise to an inference of discrimination on the basis of her membership in that class. Chambers, 43 F.3d at 37; see also Woroski v. Nashua Corp., 31 F.3d 105, 108 (2d Cir. 1994); Stetson, 995 F.2d at 359. This fourth element of the prima facie case may be satisfied in a variety of ways.

The circumstances that give rise to an inference of discriminatory motive include actions or remarks made by decisionmakers that could be viewed as reflecting a discriminatory animus, see Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992), preferential treatment given to employees outside the protected class, see Washington v. Garrett, 10 F.3d 1421, 1434 (9th Cir. 1993), and, in a corporate downsizing, the systematic transfer of a discharged employee's duties to other employees, Gallo, 22 F.3d at 1225, or a pattern of recommending the plaintiff for positions for which he or she is not qualified and failure to surface plaintiff's name for positions for which he or she is well-qualified, Cronin v. Aetna Life Ins. Co., 46 F.3d 196, 205 (2d Cir. 1995). A plaintiff might also rely upon the fact that the defendant, following plaintiff's termination, continued to seek applicants to fill the position, Meiri v. Dacon, 759 F.2d 989, 996 (2d Cir.), cert. denied, 474 U.S. 829 (1985), or, more generally, upon the timing or sequence of events leading to the plaintiff's termination, Chambers, 43 F.3d at 37.

As the cited cases make clear, there is no unbending or rigid rule about what circumstances allow an inference of discrim-

ination when there is an adverse employment decision. Although the Supreme Court held in McDonnell Douglas that a prima facie case may include evidence that the position remained open and the defendant continued to seek applicants, it also noted that "[t]he facts necessarily will vary in Title VII cases, and the specification [in that case] of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." McDonnell Douglas, 411 U.S. at 802 n.13. Hence, contrary to defendant's assertion, the fourth element set forth in McDonnell Douglas is a flexible one that can be satisfied differently in differing factual scenarios.

Defendant avers that Meiri establishes that the viability of a discriminatory discharge claim depends upon evidence that the plaintiff's position remained open and that the employer continued to seek other applicants. But Meiri, a case in which the plaintiff claimed she had been terminated because of her religious beliefs, does not support such a rule. The district court had rejected a Title VII claim because the plaintiff had not been replaced by someone outside the protected class. Meiri, 759 F.2d at 994. Noting that such a requirement was too mechanistic and conflicted with the policies underlying Title VII, we held the appropriate inquiry should have been "whether the employer continued to seek applicants to fill the position." Id. at 996. As we made clear, however, this inquiry was appropriate only because although the employer sought a replacement, the position was eliminated before a replacement could be hired. Such circumstances were sufficient to support an inference of discrimination, and "[t]he fact that the position was ultimately eliminated" did not "sound a death knell to Meiri's Title VII claim." Id.

In addition, as Meiri stated, "[t]he elements of proof in employment discrimination cases . . . were intended only to promote the general principle that a Title VII plaintiff must carry the initial burden of offering evidence adequate to

'raise[ ] an inference of discrimination.'" Id. (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)) (alteration in Meiri). Thus, it was error ritualistically to require Chertkova to present evidence that her position remained open and that the employer continued to seek other qualified applicants.

C. Circumstances Supporting Inference of Discrimination

To complete her prima facie case, Chertkova only needed to show that her termination occurred under circumstances that give rise to an inference of discrimination. Plaintiff maintains the evidence was sufficient to permit such an inference. Defendant, relying on its argument that a Title VII case must include proof that the employer continued to seek other applicants, does not deny that plaintiff's proof is otherwise sufficient for a prima facie case. Instead, defendant maintains plaintiff cannot carry her ultimate burden of persuasion on the issue of whether the employer's proffered reason was pretextual.

In our view, defendant has waived any argument that summary judgment was properly granted to it because the circumstances to which plaintiff points did not raise an inference of discrimination. In any event, our resolution of the remaining question - - whether plaintiff can carry her ultimate burden of persuasion - - means that she successfully made the de minimis showing required to establish a prima facie case.

III Pretext

The employer articulated a legitimate, nondiscriminatory reason for plaintiff's termination: her performance was deficient. Plaintiff does not dispute the district court's ruling that defendant satisfied its burden with respect to the second part of the McDonnell Douglas inquiry. Instead, she contends the district court erred in holding she would be unable, as a matter of

law, to prove her employer's proffered motive was pretextual. "[T]o defeat a defendant's properly supported motion for summary judgment, a plaintiff must show that there is a material issue of fact as to whether (1) the employer's asserted reason for discharge is false or unworthy of belief and (2) more likely than not the [unlawful basis] was the real reason for the discharge." Woroski, 31 F.3d at 108-09 (citing Hicks, 509 U.S. at 515).

The district court reasoned that plaintiff failed to raise a genuine issue regarding pretext because a disagreement with the employer's performance appraisal is insufficient to show pretext, Connecticut General advanced substantial evidence of plaintiff's deficiencies, the employer had told plaintiff of her performance problems and had given her a chance to improve, and plaintiff's allegations of discrimination were conclusory. We think this rationale fails to draw the proper inferences and impermissibly resolves disputed factual issues.

Although plaintiff did advance some conclusory allegations, she also presented concrete evidence sufficient to permit a rational jury to conclude she was discharged because of her sex. To begin with, accepting as true plaintiff's description of May's interactions with her, a jury could conclude that his assessment of plaintiff was derived primarily from her being a woman rather than her professional abilities. Plaintiff charged that May consistently refused to discuss work-related matters with her, telling her stories of his personal dealings with women instead. And, while defendant insists these words and actions are gender neutral, we cannot agree. Although recounting one's personal life -- or even using a term like "clotheshorse" -- might under some circumstances be neutral, in this case such conduct might support an inference of gender bias. A factfinder could properly find that a department manager who avoids discussing business and limits his interactions with a female employee to discussions

of his personal exploits - - adding only a demeaning comment on her manner of dress - - is likely to discriminate on the basis of that employee's gender.

Next, there is evidence that Patricia Endweiss, another competent woman in the department, was discharged in part because of poor communication skills, a reason similar to the one proffered by defendant for plaintiff's discharge. Connecticut General counters that Endweiss herself was not prepared to say in her deposition that her discharge resulted from her gender. This does not resolve the matter in defendant's favor because May's similar treatment of Endweiss may still bolster the conclusion that he treated women differently than men. Nor can the employer deny that Chertkova and Endweiss, along with one other woman, were the only people terminated in the department between the time May assumed control in mid-1990 and early 1993, after plaintiff was gone. Although (as the employer asserts) it may be unlikely that May later terminated male employees simply to avoid the consequences of a discrimination suit, a jury could find that the sequence of the discharges, along with the reasons given and the other circumstances, evidenced gender bias. Further, Cocolla had an opportunity to observe O'Neil's dealings with Chertkova directly, and apparently concluded that gender contributed to the failure of his coaching and to the offensive work conditions experienced by plaintiff, as shown by her sending plaintiff a copy of the book You Just Don't Understand: Men and Women in Conversation. Such evidence supports a finding that Chertkova's discharge resulted from her gender. Defendant's only response -- that the book itself is not in the record - - is inapposite.

Moreover, while O'Neil claims to have met with Chertkova on September 20, 1990 to discuss her purported deficiencies, and created a document memorializing such a meeting, Chertkova denies any such meeting ever took place. Accepting as true plaintiff's version, it is plausible that O'Neil was creating a record aimed at rationalizing plaintiff's termi-

nation. Plaintiff acknowledges that later meetings, reprimands, and coaching sessions were indeed held, but she presented enough evidence to justify the belief that her performance -- including her conduct vis-à-vis management and her relations with customers -- was wholly adequate or even superior. This evidence includes not only her own affidavit, but also affidavits and deposition testimony of other employees. That the proffered motive was a pretext is further supported by O'Neil's alleged threats at the coaching sessions, Quirk's rewrite at May's instigation of a formerly "excellent" evaluation, and the denial of plaintiff's request to attend a course on communication which she claims was available to all other employees.

The facts here are different from the "conclusory allegations of discrimination" relied upon in Meiri, 759 F.2d at 998 (referring to allegations that supervisor sought to eliminate plaintiff, that supervisor's view of plaintiff's work habits was infected by prejudice concerning her religion, and that plaintiff heard "disparaging remarks," where plaintiff admittedly could not "pinpoint people, times, or places"). Nor is this case like Woroski, 31 F.3d at 109, in which "the totality of the evidence overwhelmingly established a nondiscriminatory motive." Taken together, the proof of bias is much stronger in the present case, and it precluded summary judgment. The evidence amply supports our view that a factfinder could believe Chertkova lost her job because she is a woman.

In addition, contrary to defendant's suggestion that the evidence of performance deficiencies was overwhelming, a jury could reasonably conclude that this proffered reason was pretextual. Chertkova was concededly professionally and technically highly competent. She presented proof that documenting a pattern to get rid of an unwanted employee was a recognized practice at the company and the evidence suggests May, O'Neil, and Quirk may have done exactly that in her case.

## CONCLUSION

Accordingly, we reverse the district court's grant of summary judgment and remand for proceedings not inconsistent with this opinion.

Exhibit B

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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**THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4th day of April, two thousand.

PRESENT: HON. GUIDO CALABRESI,
HON. SONIA SOTOMAYOR,
HON. DAMON J. KEITH[1],
*Circuit Judges.*

STAMPED: **UNITED STATES COURT OF APPEALS**
FILED
APRIL 4 2000
ROSEANN B. MACKECHNIE, CLERK
SECOND CIRCUIT

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1. The Honorable Damon J. Keith, of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

STELLA CHERTKOVA,
*Plaintiff-Appellant,*

v.

CONNECTICUT GENERAL LIFE INSURANCE CO.,
*Defendant-Appellee.*

SUMMARY ORDER

# 99-7859

Appeal from the United States District Court
for the Connecticut (Covello, Judge).

UPON DUE CONSIDERATION, it is ORDERED, ADJUDGED, AND DECREED that the order of the district court be and hereby is AFFIRMED.

Appearing for Appellant: Stella Chertkova, *pro* se, Simsbury, CT.

Appearing for Appellee: Robert C. Drake, Hartford, CT.

Plaintiff Stella Chertkova appeals from an order of the United States District Court for the District of Connecticut (Covello, J.), granting summary judgment for defendant, her former employer, Connecticut General Life Insurance Co. ("CGLIC"), on her Connecticut law claims for negligent representation. Plaintiff also appeals from the jury verdict in favor of defendant following a trial on her Title VII claim for gender discrimination. We affirm.

## BACKGROUND

In 1993, Chertkova, through counsel, filed this suit against CGLIC alleging (1) that she was discharged on the basis (a) of her gender, in violation of Title VII, 42 U.S.C. § 2000e et seq., and (b) of her disability, in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., and (2) that

defendant negligently misrepresented (a) company policy on communication between staff and management and (b) plaintiff's employment status. In 1994, the district court granted CGLIC's motion for judgment on the pleadings on the ADA claim. Chertkova did not appeal. In 1995, the district court granted summary judgment for defendant on the Title VII claim and, declining to exercise supplemental jurisdiction, dismissed the two state law claims. On appeal, we reversed the district court's grant of summary judgment on the Title VII cause of action. *See Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.3d 81 (2d Cir. 1996). Our decision had the side effect of reinstating the state negligent misrepresentation claims in federal court. On remand, however, the district court granted summary judgment for CGLIC on these state law claims. The Title VII claim then proceeded to trial. A jury ultimately returned a verdict in favor of defendant. Plaintiff, now pro se, appeals both from the district court's grant of summary judgment on the state law claims and from the jury verdict.

## DISCUSSION

### I. Summary Judgment on Negligent Misrepresentation Claims

We review the decision of a district court to grant summary judgment *de novo*. *See Johnson v. Wing*, 178 F.3d 611, 614 (2d Cir. 1999). Chertkova contends that the district court erroneously relied on disputed facts in granting CGLIC summary judgment.

Our review of the record shows the following facts. Chertkova began working as a computer programmer for defendant in 1979. She was a highly competent computer programmer with "excellent technical skills," but, according to defendant, had problems with regard to her communications, customer service, and interpersonal abilities. Plaintiff herself concedes that, at least for a portion of her tenure with CGLIC,

she had a reputation for being "difficult."

In 1990, Craig May became head of the Operations Engineering department, in which Chertkova worked. May assigned Jeff O'Neil to be plaintiff's supervisor. Chertkova viewed both May and O'Neil as lacking sufficient technical knowledge to be capable of managing her or the department.

In the summer of 1990, Chertkova attended a presentation intended to introduce employees to the company's new "Operating Values," which emphasized the importance of "Teamwork," "People," "Knowledge," "Leadership," and "Quality." Defendant's Appendix ("DA"), Tab 4 at 5. The "People" section of the company's "Operating Values" brochure included the following statements: "[w]e treat every individual with dignity," "[w]e base our internal and external relationships on respect," and "[w]e encourage open, honest, and constructive communications at all levels." Id. At the meeting on "Operating Values," Chertkova posed questions regarding the amount of technical knowledge managers were supposed to possess. According to defendant, Chertkova was "highly critical" and "belittl[ing]" of her management team and disruptively turned a meeting designed to discuss and understand "Operating Values" into an individual complaint session. Claybrook Aff. Chertkova, on the other hand, maintains that her questions, in her view, were "entirely appropriate," were "not disrespectful or disruptive," and were not "sarcastic or demeaning." Chertkova Aff. at 7. She does not dispute, however, that she could have been perceived as taking issue with individual managers, and indeed concedes that she could have been interpreted as "highly critical of [her] own management." Chertkova Dep. at 71. Moreover, she also acknowledges that, in general, she could be seen as "blunt." *Id.* at 63-64.

On September 20, 1990, defendant asserts, O'Neil met with

Chertkova and told her that although her technical work continued to excel, she still exhibited communications problems. A memo memorializing the meeting stated that plaintiff was unable "to listen to customer issues and concerns" and noted that she had "outwardly chastised management." Chertkova Dep. Exh. 3. O'Neil also told plaintiff in the memo that, as a relatively senior officer in the company, "she must find more positive methods for bringing her concerns to management." *Id.* Although Chertkova disputes that O'Neil met with her in September 1990 to discuss these issues, she acknowledges receiving the memo.

In early 1991, CGLIC held a presentation, which Chertkova attended, on "Total Quality Management" ("TQM"). Because the theme of the meeting was empowering employees by encouraging them to share their ideas, plaintiff took the opportunity to air her views. In particular, she asked why a project she believed important, but that management had opted not to pursue because of cost, had not been implemented.

A few weeks later, in April 1991, O'Neil placed plaintiff on an informal "performance improvement plan" and directed her to improve her "active listening skills[1]. *Chertkova*, 92 F.3d at 85. Chertkova asserts in an affidavit that she was put on the plan solely because of her comments at the TQM meeting. In June 1991, she was placed on a second performance improvement plan with respect to similar communications issues. Later that summer, O'Neil put her on probation, "the conditions of which included: 'demonstrat[ing] the behaviors intrinsic to the published *teamwork* Operating Values,' giving dissenting opinions 'constructively and in the appropriate,

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1. Under CGLIC's progressive approach for addressing the problem of employees who fail to meet job performance standards, a performance improvement plan is a first step in explaining to the employee the standard not being satisfied and enabling the employee to meet the requisite objective.

private setting,' and improving 'written communications,' and 'active listening skills.'" *Id.* She successfully completed probation, but was told that she could be fired at any time in the next two years if she failed to maintain satisfactory performance in her communications skills. *See id.*

In early March 1992, Chertkova' then-supervisor, Terry Quirk, prepared a letter, dated March 6, 1992, terminating Chertkova. That letter was not delivered, however, because plaintiff suffered a nervous breakdown on March 5, 1992 and did not thereafter return to the office. *See id.* at 86. She was diagnosed with "adjustment disorder with mixed emotional features," submitted a disability claim to CGLIC, and eventually received 26 weeks of disability benefits. Approximately a month after she left work, she interviewed for a job with another company and, in 1993, began working for other employers. In October 1993, she filed this complaint, alleging, *inter alia*, that defendant had negligently represented (a) its policy of encouraging open communication and (b) plaintiff's employment status after March 1992. After learning during discovery, in July 1994, that Chertkova had obtained other employment, defendant terminated her, effective August 12, 1994.

In order to make out a claim of negligent representation under Connecticut law, plaintiffs must show that the defendant "in the course of his business, profession or employment . . . supplies false information for the guidance of others in their business transactions . . . if he fails to exercise reasonable care or competence in obtaining or communicating the information" and these others suffered "pecuniary loss caused to them by their justifiable reliance upon the information." *D'Ulisse-Cupo v. Board of Dirs. of Notre Dame High Sch.*, 202 Conn. 206, 218 (1987) (quoting Restatement (Second) of Torts § 552 (1979)).

The district court correctly granted summary judgment on the claim regarding CGLIC's communications policy.

According to plaintiff, the fact that she was disciplined (i.e., placed on a performance improvement plan and on probation) because of her comments at the TQM meeting, despite a company policy that on its face encouraged employees to share their ideas, shows that CGLIC's representations about its communications policy were false. But the undisputed evidence shows that the representations made by management were not false. A policy of "encourag[ing] open, honest, and constructive communications at all levels," particularly one coupled with a premium on dignity and respect, is not at odds with a policy of discouraging potentially blunt, unpleasant criticisms of a specific manager or management decision in a public setting. DA, Tab 4 at 5 (emphasis added). Indeed, the compatibility of these two positions should have been clear to plaintiff given O'Neil's September 20, 1990 memo to her, explaining that she should "find more positive methods for bringing her concerns to management." Chertkova Dep. Exh. 3. Under these circumstances, any discipline of Chertkova for her statements at the TQM meeting was in fact consistent with its open communications policy. Because plaintiff has failed, as a matter of law, to show that defendant's representations were false, summary judgment was proper.

Summary judgment on the claim regarding Chertkova's employment status was also appropriate. In her complaint, Chertkova alleged that defendant falsely represented after March 1992 that she "was still an employee" and that it would "attempt to provide other employment for" her. Compl. at 12. But even if this were so, plaintiff has failed to show, as a matter of law, any detrimental reliance on the alleged misrepresentations. The undisputed facts show, for instance, that plaintiff interviewed for another job as early as April 1992, a month after she stopped working for CGLIC, and that she obtained employment elsewhere in 1993, the year before she received formal notice of termination from defendant. Similarly, she has adduced no evidence to the effect that she declined any job offer in the belief that she was still employed

at CGLIC. Accordingly, summary judgment was properly granted. [2]

II. Evidentiary Rulings at Trial

Plaintiff raises four challenges to evidentiary rulings by the district court at trial. Reviewing the district court's evidentiary rulings for an abuse of discretion, *see Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 150 (2d Cir. 1997), we find plaintiff's arguments to be without merit.

She objects first to the decision of the court below to exclude testimony by Zellene Sandler, a former CGLIC employee regarding an incident in 1979 involving allegedly inappropriate sexual behavior by O'Neil. The district court excluded the statements by Sandler, ruling that it would permit only testimony involving events after 1980. Plaintiff's claim at trial was that May and O'Neil had discriminated against her on the basis of gender. But May did not assume leadership of Chertkova's department until 1990, after which he assigned O'Neil to be her supervisor. *See Chertkova*, 92 F.3d at 84. The district court did not abuse its discretion by barring, as too distant, evidence of events that had allegedly occurred 11 years before the relevant period. *See Perry*, 115 F.3d at 150 (upholding district court's decision to exclude evidence of sexual harassment of plaintiff's co-workers occurring earlier than six months before plaintiff herself experienced harassment because such incidents "were too remote to have probative value").

Chertkova further maintains that the district court improperly limited her cross-examination of defendant's witness June

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2. Plaintiff contends that the District Court's erroneous dismissal on summary judgement of her negligent representation claims prejudicially affected the trial of her Title VII claim. Because the District Court's summary judgement ruling was proper, we need not address this argument.

Cocolla, a human resources officer at CGLIC, on the topic of whether other women were harassed by O'Neil. A review of the transcript reveals, however, that Cocolla's direct examination involved only the period between 1990 and 1992, and that the district court, in accord with Federal Rule of Evidence 611(b), *see* Fed. R. Evid. 611(b) ("Cross-examination should be limited to the subject matter of the direct examination . . . ."); *United States v. Koskerides*, 877 F.2d 1129, 1136 (2d Cir. 1989), limited cross-examination to this same period, expressly permitting plaintiff to ask Cocolla about other of harassment that occurred between 1990 and 1992.

Plaintiff also challenges the district court's limitation of her own testimony regarding incidents of harassment of other women. Even assuming this claim is properly preserved, despite plaintiff's failure to object, the district court did not abuse its discretion. The testimony to which plaintiff refers is her testimony on rebuttal. Since plaintiff's testimony did not purport to counter the direct testimony of any defense witness, the district court properly excluded it. *See United States v. Tejada*, 956 F.2d 1256, 1266 (2d Cir. 1992) ("The function of rebuttal evidence is to explain or rebut evidence offered by an opponent. A district court has wide discretion in determining whether to permit evidence on rebuttal." (citation omitted)).

Finally, plaintiff asserts that the district court committed reversible error in preventing her from admitting a videotaped deposition of David Whitesell, and instead in admitting only a transcript of the deposition. Plaintiff argued that Whitesell was her sole male witness and that she would be prejudiced if the jury saw only female witnesses testifying on her behalf. But in fact Chertkova presented the testimony of her son, fiancé, two male co-workers, and her male doctor. Moreover, plaintiff sought to conduct the deposition of Whitesell, an out-of-state witness, only a week before trial and long after the discovery cut-off. The parties debated whether the deposition was to occur by video or by phone,

and the court permitted the deposition, but ordered that it be taken by phone. Despite the court order, plaintiff arranged for a videotaped deposition. Under the circumstances, the district court clearly did not abuse its discretion in excluding the videotape.

III. Evidence of Plaintiff's Cancer

Chertkova additionally maintains that the district court erred in precluding her from mentioning the fact that she had cancer, thereby reducing her possible damages. Because we affirm the jury's finding against her on the issue of liability, we need not consider this argument.

CONCLUSION

Having reviewed all of plaintiff's contentions, and finding them to be without merit, we AFFIRM the judgment of the court below. Defendant's motion to strike plaintiff's reply brief is DENIED as moot.

For the Court,

ROSEANN B. MacKECHNIE

Clerk of Court

By: s/ Lucille Carr

Exhibit C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in New York City, on the 27th day of July two thousand.

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Chertkova

v

Connecticut General

Dkt No: 99-7859

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A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Stella Chertkova.

Upon the consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the court
ROSEANN B. MACKECHNIE, CLERK

By: s/ Arthur M. Heller
Arthur M. Heller
Administrative Attorney

STAMPED: UNITED STATES COURT OF APPEALS

FILED
JULY 27 2000
ROSEANN B. MACKECHNIE, CLERK
SECOND CIRCUIT

**Exhibit D**

**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

| | |
|---|---|
| **STELLA CHERTKOVA,** | : |
| | : |
| **V.** | **CASE NO: 3:93CV2046 (AVC)** |
| | : |
| **CONNECTICUT GENERAL LIFE INSURANCE COMPANY** | : |

## JUDGMENT

This matter having come on for trial before a jury and the Honorable Alfred V. Covello, Chief United States District Judge, and the issues having been duly tried and the jury having returned a verdict in favor of the defendant; it is therefore

ORDERED, ADJUDGED AND DECREED that judgment be and hereby is entered for the defendant.

Dated at Hartford, Connecticut, this 1st day of July, 1999.

KEVIN F. ROWE, Clerk

By: S/Marilyn Wiggins
Deputy Clerk

Stamped
July 1 8 33 AM '99